IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-119

JAMES DAY HODGSON, Secretary of Labor,
Plaintiff-Respondent,

and

MIKE TRBOVICH (Proposed Intervenor), *Petitioner,*

v.

UNITED MINE WORKERS OF AMERICA,
Defendant-Respondent.

REPLY BRIEF FOR PETITIONER

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AUTHORITIES CITED

CASES:

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MISCELLANEOUS:

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1. While LMRDA provides that the exclusive remedy for challenging union elections is a suit *initiated* by the Secretary of Labor, Section 403 29 USC 483, it does not speak of *intervention*. As indicated in the petition for certiorari, pp. 21-29, Congress placed exclusive authority to *initiate* suit in the Secretary so as to avoid piecemeal litigation and undue disruption of union affairs, evils which would not result from allowance of

intervention by union members satisfying the ordinary conditions of Rule 24, FRCP. As indicated in the petition, p. 21-22, and the *amicus curiae* brief in support thereof, p. 5, intervention and initiation of suit are fundamentally distinct notions, and rights of initiation and intervention, in numerous cases, are not coextensive.[1]

2. The Secretary's response incorrectly suggests that *Stein* v. *Wirtz*, 366 F.2d 188 (CA 10, 1966), *cert. denied*, 386 U.S. 996, was decided under the liberalized Rule 24, effective July 1, 1966. While the court of appeals decision post-dated the effective date of the amendment, the motion for intervention was made in December 1965 and rejected in the district court prior to the effective date. It is apparent that the case was decided under the old rule. See *Cascade Natural Gas*

[1] The Secretary's Brief in Opposition evidences the dangers inherent in a legal action without one of the principal interested groups a party to the action. For example, footnote 3 on page 5 indicates a lack of understanding of the reform group's position and a total acceptance of the Union's position. With respect to the continued maintenance of the bogus local unions, the Secretary refers to the fact that the "International Union has consistently interpreted the constitutional provision" as not requiring a local union to disband if it has fewer than 10 active members. But the Secretary here simply adopts an unsupported statement of the International Union without an independent evaluation of that interpretation or requiring the Union to justify its constitutional interpretation, or even to demonstrate that it has consistently interpreted the constitutional provision in this way. With respect to petitioner's charge concerning the pension increase, the Secretary refers to all of the Union's arguments without even mentioning Judge Gesell's ruling rejecting those arguments and removing Boyle as trustee on grounds of the pension increase. *Blankenship* v. *Boyle*, 77 LRRM 2140 (D.D.C., 1971). The spectacle of the Secretary and Boyle's counsel working out the decree for any new election without the countervailing pressure of the reform group hardly comports with the principle of equal justice under law.

Corp. v. *El Paso Natural Gas Corp.*, 386 U.S. 129, 135-136 (1967). At any rate, the petition for certiorari in *Stein* was jurisdictionally out-of-time; hence, the substantiality of the questions presented could not have been considered.

3. Neither response contains even the germ of an answer to the clear legislative history set forth in the Petition, pp. 23-28, indicating—in the words of Senate sponsor John F. Kennedy—that Title IV of LMRDA "adds to and does not detract from the members' rights," 104 Cong. Rec. 10999, June 12, 1958, and was not meant to preclude intervention.

The Secretary's response does, however, seek to discount the recent testimony of Senator Robert P. Griffin, one of the principal sponsors of LMRDA, before the Senate Labor Subcommittee. As indicated in the petition, Senator Griffin testified that he was aware of no congressional intent to preclude intervention. The Secretary dismisses the testimony as "a legislative afterthought" spoken "in the context of a highly charged political atmosphere. . . ." Senator Griffin spoke critically of the Labor Department's implementation of LMRDA under Democratic and Republican administrations alike (p. 29 of Petition), hence, his views can hardly be discounted as "political". Further, it should be noted that the occasion of Senator Griffin's statement was fundamentally non-political. The Labor Subcommittee was simply performing its legitimate task of evaluating the Labor Department's administration of LMRDA and considering the possible need for amendments. Certainly the view of a principal sponsor regarding the aims and intent of the enacting Congress was highly relevant to this task, and *equally* relevant to the issue at hand.

4. The Secretary now says he is "unaware of any . . . concession" that petitioner satisfies all conditions for intervention of right (p. 10, n. 9). But counsel for petitioner, who were present at the court of appeals argument, remain firm in their belief that such a concession was, in fact, made during the argument and, notably, the Secretary does not deny this. Petitioner can well understand that the Secretary may now wish not to be bound by the concession of his attorney who argued for him in the court of appeals, but that can hardly avoid the force of the concession. Moreover, as indicated in the Petition, petitioner fully satisfies all conditions for intervention of right.

5. Petitioner remains firm in his contention that the present case is closely analogous to *International Union, UAW* v. *Scofield,* 382 U.S. 205 (1965), where this Court held that the successful party before the National Labor Relations Board may intervene in court of appeals review proceedings. Respondent Secretary attempts to distinguish *Scofield* by asserting that his determination of probable cause under Section 402 of LMRDA is not an "adjudication" and hence, that petitioner cannot be regarded as a "successful party" in the sense of *Scofield.* But the case law developed under LMRDA and the Administrative Procedure Act do not support the Secretary's contention.[2] As defined by APA, an "adjudication" is any "agency process for the formulation of an order" and an "order" is any "final disposition, whether affirmative, negative, injunctive or declaratory in form, of an agency in a matter other

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[2] Notably Section 606 of LMRDA provides that the APA shall be applicable to "any adjudication . . . pursuant to the provisions of this Act."

than rule making. . . ." 5 USC 551(6) and (7). The Secretary's determination is an "order" reached through "adjudication" in the sense of the APA definitions. Contrary to the Secretary's assertion of non-reviewability, it has been held that complaining parties under Section 402 "have a judicially enforceable right to demand that the Secretary exercise his discretionary authority in a manner consistent with the requirements of the Act and not arbitrarily or capriciously." *DeVito* v. *Shultz,* 300 F. Supp. 381, 383 (D.D.C., 1969). The courts have exercised review of the Secretary's determinations not to sue, precisely as provided in Section 10(e) of APA, 5 USC 706, *DeVito, supra, Schonfeld* v. *Wirtz,* 258 F. Supp. 705, 708 (SDNY, 1966). This very exercise of judicial review presupposes the adjudicatory character of the Secretary's determination. Conversely, where the Secretary determines that the allegations presented by the complaining member have sufficient merit to constitute "probable cause", and he brings suit, such as here, his determination is also adjudicatory in character and the complaining member then has interests analogous to those of the "successful party" before the NLRB and under *Scofield* should be permitted to participate in subsequent judicial proceedings.[3]

[3] The adjudicatory process is no doubt different in NLRB proceedings from that in Section 402 proceedings before the Secretary. But the APA contemplates both types of proceedings, namely, adjudications with agency trial type hearings and formal findings and conclusions which are entitled to enforcement if supported by substantial evidence, and those less formal agency proceedings which require a judicial trial *de novo.* The Secretary's determination not to sue is no less an "order" within the meaning of APA than an NLRB decision, since both are subject to judicial review. See, *Citizens to Preserve Overton Park* v. *Volpe,* 91 S.Ct. 814, 820-1, 823 (1971).

Moreover, this Court's decision last Term in *Hodgson* v. *Steelworkers, Local 6749,* 91 S. Ct. 1841 (1971), holding that the Secretary may litigate only those alleged violations which were raised by the complaining member before his Union, expands and highlights the importance of the complaining member's role in the prelitigation phase of a Section 402 suit. After *Hodgson,* the claims which the Secretary may raise are limited to those raised initially *by the complaining member* before his union, and brought *by the complaining member* to the Secretary's attention, and not other possible claims which the Secretary may discover in the course of his own investigation. Since the NLRB is not similarly limited to the allegations of charging parties, the complaining party before the Secretary has an even greater role than the charging party before the Board, and hence, even stronger standing to intervene in subsequent judicial proceedings.

6. The response of the United Mine Workers illustrates the degree to which the Union's attorneys are tied to the interests of the incumbent officers, and therefore, highlights the problems arising from the Secretary's deference to the Union's position, *supra,* n. 1 Respondent UMWA's brief contains particularly misleading comments regarding candidate Yablonski's preelection suit to restrain use of the UMW *Journal* as a campaign instrument for the incumbent officers, *Yablonski* v. *UMWA,* No. 2413-69 (D.C.C., 1969), p. 6 of UMWA brief. Respondent UMWA fails to mention the District Court order of September 19, 1969, finding that the *Journal* had been used as a pro-Boyle propaganda instrument between the time Yablonski announced his candidacy (May 29) and the time he brought suit (August 26), and restraining further im-

proper use of the *Journal,* 305 F. Supp. 868 (D.D.C., 1969).

Respondent UMWA's remark that the petition is "replete with factual assertions 99 percent of which have never been proven in a court of law" is belied by findings made in *Yablonski* v. *UMWA,* 305 F. Supp. 868 (D.D.C., 1969); *Yablonski* v. *UMWA,* 71 LRRM 2606 (D.D.C., 1969); *Yablonski* v. *UMWA,* 71 LRRM 3041 (D.D.C., 1969); *Yablonski* v. *UMWA,* 72 LRRM 2687 (D.D.C. 1969); *Blankenship* v. *Boyle,* 77 LRRM 2140 (D.C.C., 1971); and *Semancik* v. *Budzanoski,* 324 F. Supp. 1292 (WD Pa, 1971). The statement is but further illustration of UMWA counsel's commitment to the parochial interests of Boyle, Titler, and Owens which tends seriously to undercut the reliability of the positions taken by the Union before the Secretary.[4]

The principle of equal justice under law cannot allow the Secretary of Labor and Boyle's lawyers to work out a decree for any new election without the countervailing pressure of the reform group.

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[4] The objectivity and independence of UMWA counsel has been under challenge in *Kafton, et al.* v. *UMWA, et al.,* Civil Action No. 3436-69 (D.D.C.), a suit by Union members against the individual Union officers for restitution of misappropriated funds. The Court of Appeals recently disqualified the UMWA's regular "outside counsel" from further representation of the Union in that case, on the ground that the firm's representation of the individual defendants prevented it from objectively and independently performing its responsibilities to the Union, 77 LRRM 2921 (CADC, 1971). Subsequently the UMWA general counsel—attorney for the UMWA here—entered an appearance on behalf of the Union. Plaintiffs immediately moved for his disqualification on the ground that he is even more intimately connected with the individual defendents than the outside firm previously disqualified by the Court of Appeals. The matter is now pending on plaintiffs' Petition for further relief to enforce the Court of Appeals' mandate.

CONCLUSION

For the reasons stated, the Petition should be granted and the decision of the Court of Appeals reversed.

Respectfully submitted,

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